

Proposed WAC 468-600 Transportation Innovative Partnership Program

Procedural History

Pursuant to RCW 47.29, the Transportation Commission began drafting administrative rules to implement the Transportation Innovative Partnership Program (TIPP) in Fall, 2005. A TIPP working group, comprised of Commissioners Forner, Stedman, and Barnes, held public work sessions to consider various provisions to include in the draft rules. Comments were encouraged and offered by the public during the work sessions. A first working draft of the TIPP rules was proposed in January, 2006 and posted to the Commission's website as an informational item for public viewing and comment.

The Commission filed its notice of intent to adopt rules under an expedited rulemaking process (CR 103, published as WSR 06-08-060). It was subsequently pointed out by legal counsel that a new state public disclosure law had recently been enacted and that the draft rules pending before the Commission contained provisions that were contradictory to the new public disclosure law. As a result, the Commission moved out of the expedited rulemaking process, corrected the public disclosure portions of the draft rules, and commenced the regular rulemaking process by filing a CR 102 (legal paperwork) and publishing the second version of the draft rules in the Washington State Register as WSR 06-20-069.

Written comments were received, both before and slightly after the deadline for comments. At its November 15, 2006 meeting, the Commission waived the deadline for written comments with regard to a submission made by Mr. Don Williams in order to accept and consider them as part of the formal rulemaking record. The Commission has received a complete unabridged set of all written comments received. The required public hearing on the proposed rules was also held during the Commission's November 15, 2006 meeting. Public testimony was received and taken under consideration. At that same hearing, staff presented an errata sheet that made several technical corrections to the draft rules, none of which contained any substantive changes to the rules or policies imbedded therein. A motion was made and duly adopted to incorporate the technical corrections contained in the errata sheet into a revised draft of the TIPP rules, which remain pending before the Commission.

The Commission directed staff to compile the comments received and provide an agency (WSDOT) response, which would be posted to the website, made available to the public, and circulated to the Commission for consideration at their next regular meeting in December, 2006. The foregoing material is in direct response to this request.

Comments received on TIP Program Rules (with WSDOT responses)

Technical Issues

One commenter pointed out several incorrect internal references and typographical errors.

WSDOT response: Most all of the points are well taken and have been addressed in the errata sheet adopted by the Commission on November 15, 2006 and incorporated into a revised draft version of the TIPP rules. *See Ex. 1.* The only suggestions that were not addressed in the errata sheet were:

- (1) An opinion that the first paragraph of WAC 468-600-103 makes an incorrect internal reference to requirements for proposal content, identified as 468-600-300 through 350. The commenter feels that 468-600-300 through 350 is unrelated to proposal content; and
- (2) An opinion that in section 605(3)(a), on the third line the term “trade secret” ought to appear in quotations, since the term is in quotations earlier in that section.

WSDOT response: WAC 468-600-103 relates to more than just proposal content; it also relates to criteria and procedures for evaluation and selection of proposals. WAC 468-600-300 includes additional disclosures that may be required of Proposers and specifies that failure to provide these additional disclosures may result in rejection of a proposal. To the extent that section 103 references additional requirements that could be imposed under sections 300 through 350, the reference appears correct.

In section 605(3)(a), the term “trade secret” is no longer in quotations because a definition was provided earlier in section (2). Having already been defined, the term no longer requires quotations to inform the reader that it is a term of art.

Substantive Issues

Comments (and some questions) were also received on substantive elements of the draft rules. For purposes of responding to issues raised, similar topics have been grouped and restated as follows:

1. Do the draft rules or existing RCW’s provide any special exceptions to allow non-state funding in certain cases?

WSDOT response: The draft rules do not establish any exceptions to the financing provisions contained in RCW 47.29.060. The referenced law does allow non-state financing in very limited situations, such as where a non-transportation public facility (e.g., a public park) is developed in conjunction with a transportation facility (see RCW

47.29.060(4)), or where a separate capital project (such as a private office building) is developed in conjunction with a transportation facility (see RCW 47.29.060(5)).

RCW 47.29 could be construed to allow the Commission to consider non-state financing and evaluate the relative costs of state financing versus alternatives. Section 160 provides:

“Before approving an agreement under subsection (2) of this section, the commission, with the technical assistance of the department, must:

(a) Prepare a financial analysis that fully discloses all project costs, direct and indirect, including costs of any financing;”

In sum, the law: (a) allows non-state financing in very limited circumstances, without any additional legislative approval; (b) does not disqualify the acceptance, consideration, evaluation, or selection of any proposal that proposes alternative financing – even for state highways; and (c) requires the Commission to conduct a financial analysis on all project costs, including financing, without restriction. While the law clearly prohibits the Commission from entering any agreements contrary to the requirement for state financing on state transportation projects, it appears possible for a proposal to be forwarded to the legislature along with a recommendation to allow alternative financing for a particular negotiated project agreement.

2. Are Advisory Committees for projects costing greater than \$300 million required, and, if so, who controls the appointments?

WSDOT response: RCW 47.29.180 requires the appointment of Advisory Committees for projects with a cost in excess of \$300 million. The Commission appoints the members, who must represent a diversity of viewpoints on the project. The Advisory Committee reviews proposals for projects and provides comments to the Commission.

3. The RCW’s require the appointment of an Expert Review Panel to review and evaluate negotiated project agreements prior to their execution. Why isn’t the ERP’s review process outlined in the proposed rules?

WSDOT response: RCW 47.29.290 specifies that the appointments are made by the Governor, with the Panel’s recommendations to be forwarded to both the Governor and the Commission. Prescribing in detail how the Expert Review Panel will operate seems unnecessary, particularly in light of the dual reporting requirements to the Commission and then to the Governor. The Governor’s recent and successful deployment of an Expert Review Panel to make findings and recommendations on the Alaskan Way Viaduct Project and the SR 520 Bridge Replacement and HOV project are a model to be emulated.

4. The statute allows WSDOT to recover its costs in processing a specific project application from that project's financial proceeds, where funds are available. Why is there no similar cost-recovery for the Commission?

WSDOT response: The relevant statute, RCW 47.29.110, requires the Department to seek cost recovery for eligible expenses from a project's financing, where available. This does not preclude the recompense of eligible expenses incurred by the Commission in carrying out its responsibilities under the statute. Like all other project expenses, charges by both the Department and the Commission are subject to strict accounting rules related to the uses of capital bond proceeds and are subject to financial audit. The lack of specific direction to recover its costs does not necessarily bar the Commission from being reimbursed from bond proceeds, so long as such reimbursement is within accounting rules.

5. WAC 468-600-030 calls for the Department to publish, upon Commission approval, Conflict of Interest guidelines and policies with which all Proposers must comply. These guidelines must be available when these rules become effective or else potential applicants will be held to a standard that presently does not exist.

WSDOT response: This is a good observation, but applies only in the unsolicited proposal context, where the private sector (rather than the state) selects projects and submits proposals without invitation. It is the Department's intention to develop general Conflict of Interest (COI) guidelines and policies to apply to the unsolicited proposal process. At the time of this writing, unsolicited proposals can be submitted beginning July 1, 2007, so the Department has until that date to propose COI guidelines for Commission adoption.

COI guidelines for specific projects will be developed and proposed by the Department for the Commission's consideration and issuance with any project solicitation. This is consistent with current practices of the state (e.g., current design/build contracting solicitations on projects in the greater Puget Sound area).

6. There are no deadlines for the Department to develop the project registry described in section 100, nor is there any requirement for the Department to actually carry out a project solicitation as published in the registry. This lack of imperative could discourage potential private sector partners from participating in this program.

WSDOT response: As to the need for a deadline to develop the project registry, a critical lesson learned from the first experience with public-private partnerships is to make sure that a project is sufficiently analyzed and appropriate to develop via a public-private partnership (PPP) before any public pronouncements. A deadline mandated in rule for establishing a registry may prove counter-productive in the long run.

The commenter is correct that there is no requirement that the Department implement any of the planned PPP projects identified on the registry. Project solicitations require

substantial funding and commitment of agency personnel. If the Department lacks adequate resources to vigorously pursue a TIPP project, it would be prudent to wait until funding and staff resources are made available, thereby increasing the likelihood that any negotiated agreement will provide substantial value for the state. Absolute mandates to conduct solicitations may not be in the public's best interest if resources are inadequate to carry out the task.

7. 468-600-100(3)(d) allows the Department to solicit proposals that are not contained on the registry. If there is no requirement for the state to solicit the proposals on the registry, and no requirement that the Department only select projects on the registry, then what is the point of having a registry?

WSDOT response: A few of the reasons for the Department not moving forward with projects on the registry were discussed in #6 above. The reason to allow the Department to deviate from the registry is this: sometimes opportunity knocks. Projects that have no known potential partners, or projects that are unusual in nature (such as many high-tech or ITS projects) may never be conceived of and subjected to the Department's internal review process for registry consideration. But circumstances can change quickly, and the Department wants to retain some flexibility to pursue unique or time-sensitive opportunities. An example may help to illustrate the point: around 1999, the telecommunications industry had a sudden interest in leasing state DOT rights-of-way. This market developed quickly, in response to the demand for expanded fiber-optic networks spawned by the dot.com boom. By the time legislation was passed to allow a PPP-type approach to granting franchises on the state rights-of-way, and by the time WSDOT enacted rules to carry out the new law around 2001, the dot.com boom turned to bust, and the demand for new fiber optic lines fell through the floor. Wireless communications were clearly on the horizon. Allowing the Department to deviate from the registry from time to time for good cause shown makes good business sense and makes WSDOT a more viable partner.

8. WAC 468-600-210 requires that a project be contained within the Washington Transportation Plan, or identified by the Commission as a "priority need of the state." This provision appears to allow the Commission to induce (if not instigate) unsolicited proposals on projects that it deems a "priority need of the state." What is the procedure for the Commission to make this designation? Does a Proposer first seek designation from the Commission, and then submit an unsolicited proposal, or would the order reverse? The rules should lay out a process for this.

WSDOT response: This ambiguity is noted; it originates in statute (RCW 47.29.030(2)(a)). The Commission could clearly pass a resolution finding that a particular project is a "priority need of the state." Although the draft rules do not specify whether the Commission must first designate the project as a priority need before an unsolicited proposal is received, or, alternatively, receive an unsolicited proposal and subsequently decide whether the project is a priority need, both paths lead to the same

place. The legislative intent of having the Commission render judgment on the necessity of the project is met.

9. Considering that WAC 468-600-215 allows the Department to postpone or delay the review of unsolicited proposals, wouldn't it be better to just repeal the unsolicited proposal process in its entirety, rather than maintain an appearance of an unsolicited proposal process but accord it low priority? WAC 468-600-215 is not workable in its current form.

WSDOT response: Leaving some public sector discretion in how to prioritize the expenditure of funds and staff resources to review unsolicited proposals is the aim of this rule. The rule also allows the Department to expedite processing of certain proposals over others, all by written order. This allows judgment to be exercised in how internal resources will be directed, rather than falling into a simple "first come, first served" process. Otherwise, the allocation of resources to carry out the TIP program is guided by, and dependent entirely upon, whoever happens to submit a proposal first, regardless of the class, category, or characteristics of the project. If the "first come, first served" process were in place, an unsolicited proposal to construct moving sidewalks from a parking facility to an employment center would have priority over, say, a proposal to construct and finance improvements to an at-risk structure like the SR 520 Bridge, if the latter were submitted a day after the sidewalk proposal. With the very limited resources available to review such proposals, an entire biennium's appropriation could conceivably be expended on a moving sidewalk proposal to the exclusion of an urgently-needed project like SR 520 Bridge replacement. Having said that, the Department endeavors to give every proposal submitted a fair and thorough review, even if not in the order the proposal is received. Proposers are free to establish expiration dates for their proposals, if time is of the essence.

Whether the unsolicited proposal process itself will result in private sector interest in submitting proposals is the paramount question raised by the commenter. Only time and experience will tell whether this process is a valuable component of the TIP program. For now, it remains in state law, and the Department has every intention of testing it and reporting the results to the Commission and other policymakers.

10. WAC 468-600-230 references a fee schedule that would be used to determine administrative fees levied by the Department to review unsolicited proposals, yet no actual fee schedule is indicated. Wouldn't it be best to adopt a fee schedule now, in advance of the unsolicited proposal process taking effect?

WSDOT response: Ideally, yes. The continued development and review of these rules has stretched longer than originally anticipated. The plan was to establish the TIP program and review processes first, and then conduct research of other states and current pricing on necessary consultant expertise in order to develop an accurate fee schedule. As it now stands, there likely will be only a few months between the final adoption of these rules and a second rulemaking process to establish a fee schedule.

11. WAC 468-600-310, which lays out the preliminary review process for proposals, contains no timelines for Departmental or Evaluation Panel action. A reasonable time limit should be established.

WSDOT response: We interpret this rule, and all other rules contained in WAC chapter 468-600, to contain an inherent “reasonable time limit” – just not expressed in specific days, weeks, or months. The nature and complexity of potential proposals makes it very difficult to predict how much time is the proper amount of time for Departmental (or Panel) review and action. The lack of deadlines fixed in administrative rule does not preclude the Department or Panel (or Commission) from issuing an estimated timeline for reviewing a particular proposal received. We believe such timelines should be established on a project-by-project basis, after a preliminary review of the submitted proposal in order to accurately gauge the complexity of the proposal and assess the type of expertise needed to grant proper review.

12. WAC 468-600-315 directs the Commission to review unsolicited conceptual proposals, but does not indicate the criteria to be used, the forum for making such decisions, or the time limits placed on its decision-making.

WSDOT response: The issue of time limits has been addressed above. The Commission ought to be granted discretion to determine whether a conceptual proposal is unique and intriguing enough to warrant further development and exploration. WAC section 310 already requires the Evaluation Panel to convene, review, and assess an unsolicited conceptual proposal according to very specific criteria (See WAC 468-600-310(2)(a) through (f)). Based on that process and those evaluative criteria, the Panel makes a recommendation to the Commission on whether to advance the proposal to the next phase of development and review. The commenter suggests the Commission ought to have similarly-detailed criteria, but we believe the rules as drafted allow greater Commission discretion, an overlay of judgment on top of the Evaluation Panel’s analytical review. Finally, on the issue of the proper forum for making its decision, the Commission remains subject to current state laws related to open public meetings, and any decisions to be made are still subject to the procedural requirements of those laws. Additional requirements about time, process, or venue for that decision seem unnecessarily burdensome.

13. Under WAC 468-600-320, is the Commission or Department required to do anything with competing conceptual proposals that are submitted, other than forwarding them to the Evaluation Panel?

WSDOT response: No preliminary review of competing conceptual proposals are needed, because the Commission has already considered the proposed project under the original conceptual proposal submittal, with the project deemed worthy of further review and development into a detailed proposal.

14. WAC 468-600-355 directs the Commission to review proposals and make a determination whether to select one or more proposals for negotiation, but the rule does not specify the exact process the Commission will use, the information it will consider in making its determination, who the Commission will rely upon for advice in addition to the Department and the Evaluation Panel, etc. These details should be included in the rule.

WSDOT response: The commenter desires to see more detail and structure in the rules governing the Commission's deliberations. The proposed rules do not adopt this approach, but rather reflect the philosophy that discretion, flexibility, and informed judgment are what distinguishes a Transportation Commission from, say, a computer program, which requires only basic operating instructions and the input of data in order to produce a logical answer. This is a basic difference in the philosophy of decision sciences. There are many elements of objective project review and evaluation that are detailed in these rules. Those elements are enhanced with another dimension of decision-making, which is that of subjective, informed opinion and judgment rendered by a citizen Commission. These rules contain both objective criteria and decision-making processes, which serve as fundamental safeguards against arbitrary action, and subjective, informed judgment, which is capable of adapting and responding to changed circumstances and information asymmetry. WAC rule 468-600-355 is a particular expression of the latter.

15. The option of allowing the Commission to conduct competitive negotiations (WAC 468-600-360) occurs well into the project selection process and after the Proposer has likely spent hundreds of thousands of dollars to reach this point in the review. The possibility of having a proposal rejected this late in the process will likely have a chilling effect on the private sector's willingness to participate in this program.

WSDOT response: The comment is an astute observation on the downside risk if the Commission elects competitive negotiations with any regularity. The option of competitive negotiations is contained in the rules, but it is certainly not mandatory and, for reasons pointed out in the comment, ought to be employed very judiciously and in instances where there are multiple proposals with no clear leader.

16. The rules related to protesting the rejection or award of a contract to a competitor in a competing proposal context (WAC 468-600-365) assumes that an aggrieved Proposer would have access to information relevant in proving that there was an improper award, yet much of a competing proposal would ostensibly be protected as trade secret.

WSDOT response: As is the case with many other competitive selection processes at WSDOT and other parts of state government, detailed scoring records would be kept and, if a protest is filed under WAC 468-600-365, those records would be made available to the challenger. Furthermore, all elements of a competing proposal(s) would need to be made available to the challenger (probably after redacting trade secret information, unless waived by the apparent successful proposer). The procedures specified in WAC 468-

600-365 are similar to other protestation of bid award procedures in use by government. If an aggrieved party felt that the administrative remedy provided in the rules is inadequate, that party retains the right to appeal the Commission's decision to a court of competent jurisdiction. The procedures provided in the WAC do not replace any rights under state law.

17. Subsection (2) of WAC 468-600-370 grants the Proposer the option of not proceeding after the Commission has selected the proposal and authorized negotiations. There ought to be a penalty associated with the withdrawal of the proposal at this stage, considering the hundreds of thousands of dollars in state expense incurred to get the project to this point.

WSDOT response: The right to withdrawal in subsection (2) is limited to situations where the Commission selects a proposal for negotiation, but subject to satisfaction of certain conditions (a provisional selection, as referred to in the rules). This is the legal equivalent of a counter-offer, since the state is adding new terms to the proposal that were not otherwise present in the original submittal (or "offer"); the state could not (and should not) seek to penalize a Proposer for not accepting what amounts to a counter-offer.

18. WAC 468-600-741 requires public hearings on proposed project agreements, but fails to indicate what specific deliberations by the Commission will follow that hearing, whether the deliberations will be public, and what information the Commission will consider before taking action. The rules should be more specific regarding these issues.

WSDOT response: The concerns raised in this comment are essentially the same as in #14 above; WSDOT's response is the same as in #14.